

02-9440

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



SR INTERNATIONAL BUSINESS INSURANCE CO., LTD.,

Plaintiff-Counterclaim Defendant, ~~RECEIVED COURT~~

- against -

PLEASE RETURN TO ROOM
1802

WORLD TRADE CENTER PROPERTIES L.L.C., SILVERSTEIN PROPERTIES, INC., SILVERSTEIN WTC MGMT. CO. L.L.C., 1 WORLD TRADE CENTER L.L.C., 2 WORLD TRADE CENTER L.L.C., 4 WORLD TRADE CENTER L.L.C., 5 WORLD TRADE CENTER L.L.C., WESTFIELD WTC L.L.C., WESTFIELD CORPORATION, INC., WESTFIELD AMERICA, INC., THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

A handwritten symbol resembling the Greek letter pi (π) in ink.

Defendants-Counter-Claimants-Appellants.

(Caption Continued on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Related to Nos. 02-9279(L), 02-9280(CON), 02-9281(CON), 02-9349(CON), 02-9350(CON), 02-9351(CON), and 02-9431 (XAP)

BRIEF FOR AMICUS CURIAE THE ATTORNEY GENERAL
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UBS WARBURG REAL ESTATE INVESTMENTS INC., WELLS FARGO BANK
MINNESOTA, N.A., As Trustee for the registered holders of GMAC
Commercial Mortgage Securities, Inc. Mortgage-Backed Pass-Through
Certificates, Series 2001-WTC, GMAC COMMERCIAL MORTGAGE
CORPORATION,

Defendants-Counter-Claimants,

- against -

THE TRAVELERS INDEMNITY CO.,

Counter-Defendant-Appellee,

ALLIANZ INSURANCE COMPANY, COPENHAGEN REINSURANCE CO. (UK) LTD.,
EMPLOYERS INSURANCE OF WAUSAU, FEDERAL INSURANCE COMPANY, GREAT
LAKES REINSURANCE (UK) PLC, GULF INSURANCE COMPANY, HARTFORD FIRE
INSURANCE COMPANY, HOUSTON CASUALTY COMPANY, INDUSTRIAL RISK
INSURERS, LEXINGTON INSURANCE CO., CERTAIN UNDERWRITERS AT
LLOYD'S OF LONDON, QBE INTERNATIONAL INSURANCE LIMITED, ROYAL
INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
SWISS REINSURANCE CO. UK LTD., TIG INSURANCE CO., TOKIO MARINE
AND FIRE INSURANCE CO., TWIN CITY FIRE INSURANCE CO.,
WURTTEMBERGISCHE VERSICHERUNG AG, ZURICH AMERICAN INSURANCE CO.,

Counter-Defendants.

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INTEREST OF AMICUS CURIAE

The attacks on the two World Trade Center towers and the resulting fires and collapses on September 11, 2001, have resulted in staggering human, emotional, and economic costs to New York. Rebuilding the affected area of Lower Manhattan in an appropriate manner is of the highest priority for the recovery of New York and the residents and businesses who make it their home. This lawsuit, to the extent it presents the issue of whether the destruction of the Twin Towers by two hijacked airplanes represented one or two "occurrences" under New York law, is likely to bear significantly on the resources available for rebuilding.

In addition, in light of the subject matter and issues involved, the present lawsuit may well prove to be a seminal case in New York insurance law. The outcome of this case may have important implications for other lawsuits arising out of the events of September 11, as well as for future lawsuits that present the issue of whether an insurance loss is the product of a single or multiple occurrences. Amicus has a strong interest in apprising the Court of the Attorney General's understanding of the relevant case law bearing on the state law issue of whether the collapses of the two World Trade Center towers represented one or two occurrences under New York law.¹

¹ Amicus understands that the present appeal (as well as the pending litigation more generally) may also present issues regarding whether some or all of the parties agreed to adopt a

ARGUMENT

POINT I

THE UNDEFINED TERM "OCCURRENCE" IN AN
INSURANCE POLICY IS NOT INHERENTLY AMBIGUOUS,
BUT RATHER HAS A SPECIFIC MEANING UNDER NEW
YORK INSURANCE LAW WHEN ASSESSING WHETHER THE
ATTACKS ON THE TWIN TOWERS OF THE WORLD
CENTER CONSTITUTE ONE OR MORE THAN ONE
OCCURRENCE

The district court erred in concluding that the undefined term "occurrence" in an insurance policy is ambiguous for purposes of determining whether the attacks on the two World Trade Center towers amount to one or more than one occurrence. See World Trade Center Properties LLC v. Travelers Indem. Co., 2002 U.S. Dist. LEXIS 9863, at *13-17 (S.D.N.Y. June 3, 2002). Where the term "occurrence" is undefined in an insurance policy, courts applying New York law have consistently applied a definition that relates back to the definition of "accident" set forth in the seminal New York Court of Appeals case, Arthur A. Johnson Corp. v. Indem. Ins. Co. of North America, 7 N.Y.2d 222 (1959), which is applicable in assessing whether the September 11, 2001 attacks on the two World Trade Center Towers constitute a single or multiple occurrences. As this Court has summarized,

different meaning for the term "occurrence" from that which is generally applied under New York law. The Attorney General takes no position regarding whether some or all of the parties may have agreed to a definition of occurrence that differs from the one generally applied under New York law.

"[u]nder New York law, multiple injuries are grouped as a single 'occurrence' when they arise out of the same event of unfortunate character and occur close in time with no intervening agent." In re Prudential Lines, Inc. (Dicola v. American Steamship Owners Mut. Protection & Indem. Ass'n), 158 F.3d 65, 81 (2d Cir. 1998).

As will be discussed at greater length below, see infra Point II, the New York courts, and this Court applying New York law, have repeatedly been called upon to determine whether multiple events amount to one or more than one occurrence, where there is no specific definition of that term in the applicable insurance policy. In this context, this Court and others have consistently found that the term "occurrence" is not ambiguous. See Prudential, 158 F.3d at 79 (finding term "occurrence" as used in deductible provision not ambiguous); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 225 Conn. 299, 300-007 (2001) ("Although the term occurrence is not defined in the policies, the Second Circuit Court of Appeals, applying New York law consistently has held that it is unambiguous").²

² Where a policy term is found to be ambiguous, "the insurer bears the heavy burden of demonstrating that it would be unreasonable for the average man reading the policy to construe it as the insured does and that its interpretation of the insurance policy provisions is the only construction that fairly could be placed on the policy." Haber v. St. Paul Guardian Ins. Co., 137 F.3d 691, 698 (2d Cir. 1998) (citation omitted); see also Vargas v. Insurance Co. of North America, 651 F.2d 838, 839-40 (2d Cir. 1981) (where policy is susceptible of more than one construction, "[t]he insurer is obliged to show (1) that it would be unreasonable for the average man reading the policy to

POINT II

UNDER NEW YORK LAW, THE CRASH OF ONE AIRPLANE INTO ONE WORLD TRADE CENTER, AND THE SUBSEQUENT CRASH OF A SECOND PLANE INTO TWO WORLD TRADE CENTER, AS WELL AS THE RESULTING FIRES AND COLLAPSES OF THE TOWERS, WERE TWO SEPARATE OCCURRENCES FOR INSURANCE PURPOSES

In its decision denying summary judgment, the district court, having concluded that the term "occurrence" is ambiguous, did not reach a conclusion as to whether the attacks on the Twin Towers constitute one or more than one occurrence. In the event that this Court agrees that occurrence is not ambiguous, and determines that the definition generally utilized by courts under New York law applies in this case, the Court should hold that the attacks on the Twin Towers of the World Trade Center were two separate occurrences for insurance purposes.

Whether an insurance loss is the product of a single occurrence or multiple occurrences under New York law, as interpreted by the New York Court of Appeals and applied by this Court, is governed by two straightforward overarching principles, each of which is designed to serve the fundamental goal of defining "occurrence" in a manner that reflects the "reasonable expectation and purpose of the ordinary business man when making an ordinary business contract.'" Arthur A. Johnson Corp. v.

(construe it as the insured does) and (2) that its own construction was the only one that fairly could be placed on the policy" (citation omitted)).

Indemnity Ins. Co. of North America, 7 N.Y.2d 222, 227 (1959) (quoting Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 51 (1918)). Application of these principles here makes it clear that the crashing of two separate airplanes – one into each of the Twin Towers, resulting independently in separate fires and the collapse of each tower – constituted two distinct occurrences for insurance purposes under well-established New York law.

The first controlling principle is that an occurrence is not defined by the onset of the conduct or conditions that, while producing no harm in and of themselves, set in motion the events that ultimately lead to particular damage or injury. Rather, an occurrence can only take place at the point of damage or injury itself. As this Court has put it, in articulating the New York rule, an occurrence is "the final link in the causal chain leading to . . . liability." In re Prudential Lines, Inc. (Ducola v. American Steamship Owners Mut. Protection & Indem. Ass'n), 158 F.3d 65, 81 (2d Cir. 1998) (emphasis added). In simple terms, the occurrence is not the hurling of the stone, but the shattering of the window. In the instant case, this principle compels the conclusion that the hatching of a coordinated terrorist plot (which is conceded, for the sake of argument, to be the remote "cause of causes" of the disaster) to use four planes to attack each of the Twin Towers, the Pentagon,

and presumably a fourth target in Washington D.C.,³ was not – and could not be – an occurrence under New York law. Rather, each distinct point of injury (in New York, the fires and the collapses of Tower One and Tower Two) constituted a separate occurrence.

The second controlling principle of New York law dictates that the determination whether multiple "moments of injury" are to be regarded as separate occurrences or, instead, parts of a single occurrence, turns on whether the injuries are part of an "unbroken continuum of events," a designation usually characterized by proximity of the injuries in time and space and a direct causal connection between the injuries. While examples of scenarios that fit this designation are discussed in greater detail below, the attacks on the World Trade Center, and resulting fires and collapses of the towers, do not constitute such a scenario. The two strikes against One World Trade Center and Two World Trade Center – separated in time and space, and without direct causal relation to each other – were not part of a "continuum of events" as that phrase is used in this context.

³ As is well known, the fourth hijacked plane, presumably destined for Washington, D.C.; crashed in Pennsylvania before reaching its target.

A. Under New York Law, the Presumed Existence of a Single Terrorist Plan to Attack Multiple Targets in New York City and Washington D.C. Does Not Support a Conclusion That the Attacks on the Two World Trade Center Towers Were a Single Occurrence.

In identifying an occurrence under New York law, "courts should look to the event for which the insured is held liable, not some point further back in the causal chain." Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1213 (2d Cir. 1995) (citing Johnson, 7 N.Y.2d at 230), modified, 85 F.3d 49 (2d Cir. 1996). Johnson, the seminal New York case on this issue, applied this rule to facts that parallel those of the instant case in every legally material respect. Any claim that the fires and resulting collapses of the World Trade Center towers were a single occurrence because the two separate plane crashes emanated from a single terrorist plot is plainly irreconcilable with the reasoning and result of Johnson.

In Johnson, the insured, a contractor, had constructed two separate, temporary cinder block walls to enclose the sub-basements of two adjoining but separate buildings in New York City. During "a rainfall of unprecedented intensity," 7 N.Y.2d at 225, the wall in front of one of the buildings gave way, flooding the sub-basement and causing property damage. Fifty minutes later, the wall in front of the second building was breached, causing similar damage. Because the cumulative damage exceeded \$50,000, the policy limit for "each accident" (a term

the Court of Appeals has equated with "occurrence" in this context),⁴ the dispute between the parties centered on whether the collapse of the two walls was one accident or two.

The Court considered three possible approaches to the problem of defining "accident," finally adopting the one it considered the soundest: "the term is to be used in its common sense of 'an event of an unfortunate character that takes place without one's foresight or expectation' That is, an unexpected, unfortunate occurrence." Id. at 228 (citation omitted, emphasis added). The Court gave further meaning to this phrase -- "an unexpected, unfortunate occurrence" -- by explaining the two alternative formulations it had considered and rejected. First, as discussed below, with regard to the influence of remote causes on the "occurrence" calculus, the Johnson court rejected an approach under which, "'where . . . one negligent act or omission is the sole proximate cause, or causa causans, there is, as a general rule, but one accident, even though there be several resultant injuries or losses.'" Id. at 227-28 (quoting Hyer v.

⁴ As discussed below, Johnson defined "accident" as "an unexpected, unfortunate occurrence." 7 N.Y.2d at 228. The Court of Appeals also treated the words "accident" and "occurrence" as "synonymous" in Hartford Accident & Indemnity Co. v. Wesolowski, 33 N.Y.2d 169 (1973), based on their interchangeable use in past cases as well as the agreement of the parties. Id. at 172-73. See also Prudential, 158 F.3d at 80 (In Wesolowski, "[t]he Court of Appeals found no difference between the meaning of the words 'accident' and 'occurrence.'").

Inter-Insurance Exchange, 77 Cal.App. 343, 350 (Ct. App. 2d Dist. 1926)). Second, as explained in Point B, infra, the Court also rejected an approach under which every single injury, even those that are inextricably interrelated, would be considered a distinct occurrence.

The first approach is the one that Travelers would likely have this Court take here - i.e., treating the terrorists' plan to crash two planes into Towers One and Two as mandating a conclusion that only one occurrence took place, no matter the number or nature of the injuries ultimately inflicted. Such an interpretation is conclusively foreclosed by Johnson. Eschewing an analysis in which the existence of remote causes is dispositive, the Johnson court held that the collapse of two different walls because of the water pressure from a heavy rainfall, and the consequent flooding of two different buildings at two different times, constituted two separate accidents. The existence of a common remote cause did not determine the number of accidents:⁵ "[T]he catastrophe was not the rain itself that,

⁵ Two other New York Court of Appeals decisions reinforce the distinction between primary forces and ultimate injuries. In Album Realty Corp. v. American Home Assurance Co., 80 N.Y.2d 1008 (1992), the Court held that an exclusion in an insurance policy for loss "caused by freezing" was inapplicable where a sprinkler head froze and ruptured, causing flooding of the insured building's sub-basement and, in turn, damage to equipment in the sub-basement and structural damage to the building. While acknowledging that "the property damage would not have occurred in the absence of the freezing," the Court concluded that the

in itself, did no harm. It was the breach of the wall letting the rain water in." Id.

In concluding that accidents should be defined only by points of injury and not by the remote forces that led to them, Johnson followed the logic of two cases that are representative of the common circumstance of multiple accidents emanating from a single initiating force. Anchor Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949), involved an "oil well [that] blew up, remained out of control, and continued intermittently for 50 hours to erupt, hurling waste materials upon the property of various neighbors, the victims depending on the direction of the wind." Johnson, 7 N.Y.2d at 228. Anchor Casualty rejected the argument that because all damage flowed from a single explosion, there was only one accident. As Johnson noted, based principally on the intermittent nature of the eruptions over the course of

cause of the loss under the policy was water damage, the "most direct and obvious cause," and the one that a "reasonable business person would conclude in this case" was responsible for the plaintiff's loss. Similarly, in Bird v. St. Paul Fire and Marine Insurance Co., 224 N.Y. 47 (1918), the Court concluded that a fire that caused an explosion, a second fire, a second explosion, and, finally, a concussion of air that damaged the insured's boat about a thousand feet away, did not result in a loss by fire. "Especially in the law of insurance," the Court observed, "'you are not to trouble yourself with distant causes.'" Id. at 53 (citation omitted). While these cases did not involve claims of multiple occurrences, they applied the same analysis employed in Johnson to conclude that the nature of an insurance loss is to be found, not in distant triggering causes, but in the locus of the injury.

two days, and the presence of "the wind as a supervening force," the Anchor Casualty court found that "[n]umerous accidents were the product of this motivating force [i.e., the explosion of the oil well]." Id. at 229 (quoting Anchor Casualty, 178 F.2d at 324).

As a second example of multiple occurrences flowing from a common cause, Johnson pointed to a Tennessee Supreme Court decision, Kuhn's of Brownsville v. Bituminous Cas. Co., 270 S.W.2d 358 (Tenn. 1954), which the Johnson court considered "the case most similar to the instant case," Johnson, 7 N.Y.2d at 229. In Kuhn's, the Tennessee court concluded that separate accidents existed where excavation of the insured's two adjoining buildings led to the collapse of the building immediately west of them, and two days later to the collapse of the building to the immediate east of them.

The terrorist plan here correlates directly with the heavy rainfall in Johnson, the original explosion of the oil well in Anchor Casualty, and the excavation in Kuhn's. Each was a remote cause that set in motion the events leading to injuries, but that "in itself, did no harm," Johnson, 7 N.Y.2d at 230. None of the courts considering these remote causes found that the distinct injuries to which they led could be grouped into a single occurrence simply because they flowed from a common remote cause. Johnson, along with Anchor Casualty and Kuhn's, negates the claim

that the existence of a coordinated terrorist plan dictates the conclusion that there was only one occurrence here.

The decisions of this Court applying New York law on this issue further support the conclusion that the presumed terrorist conspiracy cannot be deemed the correct reference point for determining the number of occurrences at the World Trade Center on September 11, 2001.

In Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178, 1212 (2d Cir. 1995), modified, 85 F.3d 49 (2d Cir. 1996), this Court considered whether numerous property damage claims against a manufacturer of asbestos products, which related to "thousands of buildings, constructed by many owners around the country over the course of half a century or more," arose from one or more than one occurrence. The Court rejected the district court's determination that there was only one occurrence – the company's "general decision to manufacture asbestos" – holding that under New York law, "courts should look to the event for which the insured is held liable, not some point further back in the causal chain." Id. at 1213. The Court then found that the installation of asbestos-containing materials in each building was a separate occurrence. Each installation exposed the manufacturer to liability for property damage. Thus, "for each installation, there was a new exposure and another occurrence."

Id. Similarly, here, each fire and ensuing collapse of each of the towers should be treated as a separate occurrence.

This Court "appl[ied the New York] test" again in Prudential, 158 F.3d at 81, and again ruled that the number of occurrences was not to be determined by the common remote cause of injuries, but by the injuries themselves, which triggered the insured's liability and its right to coverage for that liability under the insurance policy. Prudential presented the question whether multiple claims of bodily injury related to asbestos exposure aboard each of an owner's ships pertained to a single occurrence (the presence of asbestos on each Prudential ship) or multiple occurrences (each individual claimant's exposure to asbestos). The Court concluded that under New York's "unfortunate event" test, "[t]he unfortunate event causing personal injury is the exposure of people." These were the events for which the insured was liable, "'not some point further back in the causal chain.'" Id. at 80 (quoting Stonewall, 73 F.3d at 1213). Under New York law, these injuries could not be grouped into a single occurrence because they did not "arise out of the same event of unfortunate character and occur close in time with no intervening agent":

Claimants seek to hold Prudential liable for bodily injury and the last link in the causal chain leading to Prudential's liability for bodily injury was exposure to asbestos. Each Claimant was separately exposed to asbestos

at different points in time. Therefore, the injuries arise from multiple occurrences.

Id. at 81 (footnote omitted).

B. The Separate Fires and Collapses of One World Trade Center and Two World Trade Center Constituted Two Separate Occurrences Because They Were Not Part of an "Unbroken Continuum."

It having been established that the existence of a single remote cause has no bearing on the number of occurrences, the remaining question is whether, in a given case, multiple injuries are to be aggregated and treated as a single occurrence. Under the standards enunciated in Johnson, and applied in the New York and federal cases interpreting it, the two airplane attacks on the World Trade Center should not be aggregated and instead were two separate occurrences.

To be sure, not every injury is a separate occurrence. Just as Johnson rejected an approach giving analytical primacy to distant causes, it also rejected an approach – at the opposite extreme – under which "the number of accidents is determined by the number of persons damaged." Id. at 228. Under this rule, every injury, no matter how closely related – temporally, spatially, or causally – would constitute a distinct occurrence. As with the theory equating a single causa causans with a single accident, the Johnson court found that the "one accident per injury" principle did not comport with the "common sense," "practical" construction that "the average person anticipates

when he buys insurance and reads the 'accident' limitation in the policy." Id. at 229.

Instead, the analysis for determining whether multiple injuries are "one [or more than one] unfortunate event or occurrence," Johnson, 7 N.Y.2d at 229 — an analysis employed in Johnson and further crystallized in Wesolowski, 33 N.Y.2d 169 — turns on whether the injuries are part of an unbroken continuum of events. Multiple occurrences are characterized by individuating factors, including, principally, discreteness of the injuries in time and space, and the absence of direct causal connection between the individual injuries (as opposed to a connection between the remote motivating force and the multiple injuries). Conversely, multiple injuries are part of a continuum, and comprise a single occurrence, where these individuating factors are weak or non-existent.

For example, in concluding that the breach of each protecting wall was a separate accident or occurrence, the Johnson court observed that the walls gave way almost an hour apart. Further, the Court relied on the absence of a causal connection between injuries as evidence of multiple accidents: "There is no suggestion that the collapse of the first wall caused the failure of the second." Johnson, 7 N.Y.2d at 230. Also notable is the Court's implicit observation that mere spatial proximity between injuries does not make them a single

accident: "[I]f the walls were located blocks away from each other on different job sites but subject to the same rainfall, no one could contest that there were two accidents." Id. In other words, while injuries that are part of a continuum almost always occur close together, injuries that occur close together do not necessarily make up a continuum.

All of these considerations at play in Johnson apply to the same effect in this case, whose key facts correspond closely to the essential elements of Johnson. Just as in Johnson, the strikes against the two World Trade Center towers, the fire in each tower, and the resulting collapses, involved two different injuries at two different times. And, as with the flooding of the two sub-basements in Johnson, the burning and collapse of the first tower in this case did not cause the burning and collapse of the second. In the absence of such a causal connection, the fact that the two towers, although clearly separated from each other, stood in relative proximity is immaterial, as was the proximity of the two flooded buildings in Johnson. As with the example used in Johnson, the two fires and collapses of the Twin Towers were no more a single occurrence than if the buildings had been situated blocks away from each other – or if they had been located hundreds of miles away, as was the Pentagon, also damaged by an attack arising from the same terrorist plot.

Indeed, with regard to the distinction between injuries, this case presents an even stronger claim of multiple occurrences than Johnson. Here, the intervening circumstances necessary to effectuate a terrorist plan involving two separate plane crashes were far less certain to occur than those at work in Johnson. Whereas the injuries in Johnson were directly occasioned by the insufficient strength of two walls that stood in place even before the triggering rainfall began, completion of the terrorist plan depended, inter alia, on far less predictable human factors, including the intentions of two different groups of hijackers and their capability to carry out their horrifying mission. Either group of hijackers could have chosen not to complete the suicidal assignment, been stopped at the airport, missed their intended target, or, as with the plane that hit the ground in Pennsylvania, crashed before reaching it due to the intervening heroism of the flight's passengers or other factors. The presence of this comparatively complex and unsure set of intervening variables makes this even more conclusively a "two occurrence" case than Johnson.

The fact that the attacks on and collapses of the World Trade Center towers involved two occurrences is underscored by Wesolowski, the case in which the Court of Appeals applied the teachings of Johnson to find that a three-car accident involving two separate impacts constituted a single occurrence. In

Wesolowski, "the insured's automobile struck one oncoming vehicle, ricocheted off and struck a second more than 100 feet away." 33 N.Y.2d at 170. The Court succinctly explained its conclusion that there was just one occurrence:

Applying the "event" test, then, to the facts before us on this appeal, we conclude that there was but a single occurrence. Unlike Johnson in which there was a 50-minute elapsed interval between the collapse of the first and the second cellar walls, the two collisions here occurred but an instant apart. The continuum between the two impacts was unbroken, with no intervening agent or operative factor. We think in common understanding and parlance there was here but a single, inseparable "three-car accident."

Id. at 173-74 (citation omitted).

The critical differences between Wesolowski and the instant case (as well as Johnson) are plain. The two collisions here were not an instant apart, but separated by approximately nineteen minutes. And they were not part of an unbroken continuum as that term is used in Wesolowski. While the two impacts in Wesolowski were directly effected by one agent - the insured's car - the impacts here were effected by two - the two separate planes piloted by two different groups of hijackers. Relatedly, in Wesolowski, the first impact was a but-for cause of the second. Here, in contrast, there was no "ricochet" effect and nothing in the first crash foreordained the second (indeed, it was the second tower to be hit that collapsed first). The

World Trade Center disaster could only be analogized to the facts of Wesolowski if a single hijacked plane had hit the first tower and then careened into the second, causing the fires and collapses of both. But that is not what happened.

Finally, the two central Second Circuit cases discussed in Point A - Stonewall and Prudential - further support the conclusion that the two separate injuries here were two separate occurrences. In Stonewall this Court found that each installation of asbestos, over a span of many years and in different locations, was a distinct occurrence. 73 F.3d at 1212. As here, no one injury caused another, and the temporal and spatial relation of the injuries were not such as to establish an "unbroken continuum" under New York law. Similarly, in Prudential, the individual bodily injuries were distinct in time and space, and not part of a single, causally interrelated transaction.

In sum, under New York law, the existence of a "first cause" for the World Trade Center attacks is irrelevant to determining whether the separate crashes, fires, and collapses that took place on September 11, 2001, constitute one or more than one occurrence. Further, because the independent fires and collapses of the two towers were not part of a "continuum of events" as that phrase has been defined in the decisions of New York courts,

the collapse of each building was a separate occurrence for insurance purposes.

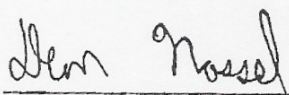
CONCLUSION

For the foregoing reasons, if this Court determines that the parties did not agree to a definition of "occurrence" different from that generally applied under New York law, the Court should find that the attacks on the Twin Towers of the World Trade Center were two separate occurrences for insurance purposes.

Dated: New York, New York
January 15, 2003

Respectfully submitted,

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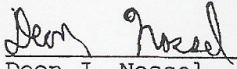
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CERTIFICATE OF COMPLIANCE

I, Deon J. Nossel, counsel for Amicus Curiae the Attorney General of the State of New York do hereby certify that the foregoing brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7). According to the word count of the word-processing system used to prepare the brief, the total number of words in the brief is 4725.


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